in two consolidated appeals—Court of Appeals Nos. 14,807 and 14,808—affirming an order of the District Court, dated July 1, 1958, entering judgment in favor of the defendants in each of the consolidated causes (R. 329).

OPINIONS BELOW

The opinion of the District Court (R. 308-328) is reported at 165 F. Supp. 100. The opinion of the Court of Appeals (Appendix B to this petition, p. 15a) is reported at 275 F. 2d 650.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on November 5, 1959 (R. 351). Order denying petition for rehearing *en banc* was entered January 11, 1960 (R. 373). Order denying petition for rehearing before the division was entered August 25, 1960 (R. 374). Orders staying until *October 26*, 1960, transmission of opinion and judgment of the Court of Appeals pending the filing of a petition for writ of certiorari were entered by that Court on September 7, 1960 and October 3, 1960 (Appendix B, *infra*, pp. 43a-44a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether in a suit by petitioner under Section 9(a) of the Trading with the Enemy Act to recover the proceeds of property taken from it by the Japanese Military authorities by force and duress, subsequently captured by the Armed Forces of the United States on a battlefield in the Philippines and later vested by the United States as Japanese-owned, petitioner was denied a hearing within the meaning of the due process clause of the Fifth Amendment to the Constitution by the refusal of the Trial Court, affirmed on appeal, to admit in evidence findings of fact

in the Vesting Order and in a Decision of the Director of the Office of Alien Property entered in a statutory administrative proceeding to recover the vested property, where,

(a) the availability to petitioner of the remedy afforded to non-enemy aliens by Section 9(a) depended upon its being able to establish that the vested property was the same property as that claimed by it, and both the Trial Court and the Court of Appeals denied recovery to petitioner on the ground that it had failed to prove "by a preponderance of the evidence" that the vested property was the same property as that claimed by petitioner;

(b) both the Vesting Order and Decision specifically found as a fact that the property vested *was* the same as the property claimed by petitioner to have been looted from it by the Japanese;

(c) because of battle conditions no witnesses were ever available to establish by direct testimony the identity of the vested property and the property claimed by petitioner; and

(d) the accuracy of the findings of fact in the Vesting Order and in the Decision specifically determining that the vested property *was* the same property as that claimed by petitioner was not denied or challenged by respondents at the trial or on appeal nor contradicted by any evidence in the record.

2. Whether the refusal of the lower courts to admit in evidence the findings of fact in the Vesting Order and the Director's Decision under the circumstances set forth in Question 1 constitutes such a restriction or limitation of the remedy afforded to non-enemy aliens by Section 9(a) of the Trading with the Enemy Act as to transform the vesting of petitioner's property into a taking of petitioner's property without due process of law in contravention of the Fifth Amendment to the Constitution.

3. Whether the Trial Court could properly ignore the established policy of the Executive and Legislative branches of the United States Government to refuse to recognize transfers of property of Allied nationals ordered by the Axis Powers during World War II, and hold as lawful and valid, a 1943 transfer of Philippine Treasury certificates made against its will by petitioner to the Japanese Military authorities in the Philippines under the compulsion of a Japanese Military Order and by reason of the fear of imprisonment or even more severe punishment of petitioner's officers in the event of non-compliance.

4. Whether the lower courts could properly rule that petitioner must prove "by a preponderance of the evidence" that the vested property was the same as certain property looted from petitioner by the Japanese Military authorities, in view of the more liberal rule for identification of looted property prescribed in binding International Agreements between the United States Government and its Allies.

CONSTITUTIONAL PROVISIONS, TREATIES AND INTERNATIONAL AGREEMENTS, STATUTES AND EXECUTIVE AND LEGISLATIVE POLICY PRONOUNCEMENTS INVOLVED

The pertinent constitutional, treaty and international agreement provisions, as well as relevant statutes and policy pronouncements by the Executive and Legislative branches of the United States Government, are printed in Appendix A, *infra*, pages 1a to 15a.

STATEMENT OF THE CASE

Proceedings In the District Court

This action was brought in the United States District Court for the District of Columbia against the Attorney

General of the United States and the Treasurer of the United States to recover certain pre-World War II Philippine Treasury certificates captured by the American Armed Forces in the Philippines and vested as enemy-owned by the Philippine Alien Property Administrator of the United States, predecessor of respondent Attorney General, pursuant to Vesting Order P-285 of August 5, 1947.

The jurisdiction of the District Court was invoked under Section 9(a) of the Trading with the Enemy Act and the Fifth Amendment to the Constitution of the United States (R. 6).

In its complaint, petitioner, a Philippine banking corporation, alleged that at the time of vesting and immediately prior thereto it was the sole legal or beneficial owner of P638,000 of the Philippine Treasury certificates included in the vested property, and that at the time of the vesting and at all other material times it was not an enemy or an ally of an enemy or a national of a designated enemy country (R. 6-8).

The respondents denied the allegation of petitioner's complaint concerning petitioner's ownership of the vested property, but admitted the other allegations of the complaint. No affirmative defenses were pleaded (R. 9).

A similar suit was subsequently filed in the District Court against the same respondents by another Philippine Bank, the Philippine National Bank (hereinafter sometimes referred to as "PNB"). In its complaint, PNB also claimed to be the owner of the vested property and prayed for its return (R. 10-12). Respondents denied ownership of the vested property by PNB (R. 14-15).

Petitioner's action and the separate action brought by PNB were consolidated, pre-tried, and subsequently tried together (R. 15, 311).

The sole issue raised by petitioner's complaint and the answer of respondents was whether petitioner was the legal or beneficial owner of P 638,000 of the total of P 662,387 of pre-World War II Philippine Treasury certificates covered by Vesting Order No. P-285, issued on August 5, 1947.

The Facts

At the trial, petitioner, in establishing its legal or beneficial ownership of the vested Treasury certificates, proved the following facts by uncontradicted documentary and testimonial evidence.

In an effort to lessen the troublesome guerilla activities in the Visayan Islands, including the Island of Negros, Philippines, the Japanese Military Administration decided, in the early part of 1943, to appease the guerillas through a currency redemption program. The guerillas held substantial amounts of emergency currency issued by the Philippine Commonwealth Government prior to the Japanese occupation. At the outset of their occupation, the Japanese had declared this currency null and void and had issued their own Japanese Military notes. Since these Military notes were steadily depreciating in value, the Japanese knew they would not be accepted by the guerillas. They, therefore, decided to redeem the emergency currency in pre-War Philippine currency. (R. 53, 129, 191, 194, 195, 197-198, 312, 314, 321).[2]

In order to carry out this redemption program, it was necessary for the Japanese Military Administration to collect and send to the Visayas a fund of valid pre-war

[2] The procedure for the registration of this emergency currency was set forth in Executive Orders 135 and 136 issued by the Commander of the Japanese Imperial Forces in the Philippines and by the head of the Japanese Puppet Government of the Philippines (sometimes known as the Central Administrative Organization and the Executive Commission) (R. 115, 192, 197, 198, 211, 217-231).

Philippine Treasury certificates and other currency. The Japanese Military Administration handled this problem through its financial agency, known as Nampo, which acted as its agent and instrumentality in regulating banking and currency transactions (R. 38, 43, 44, 129, 192, 198, 312, 319, 320, 325, 346).

Pursuant to its authority as agent of the Japanese Military Administration, Nampo addressed a Military Order to petitioner requiring it to deliver to Nampo all Philippine Treasury certificates in its possession in denominations of 1, 2, 5, 10 and 20 pesos, and receive in exchange Japanese Military notes. This Order was received by petitioner on Saturday, February 27, 1943 (R. 37-39, 40, 50, 199, 200, 201, 232, 241, 312, 313, 319, 346).

Because of their firm belief in the ultimate victory of the United States, the officials of petitioner felt that the Japanese Military notes would become worthless. They did not, therefore, want to take them in exchange for their Treasury certificates (R. 39-41, 319, 320, 321).

On the same day it received the Military Order, petitioner appealed to General Kobayashi, the highest Japanese financial official in the Philippines and Chief of the Financial Branch of the Japanese Military Administration. Kobayashi rejected the appeal and ordered compliance (R. 39-42, 199-201, 233, 234, 319).

Petitioner's officials believed that failure to comply with this Military Order would have been disastrous. They were not only familiar with the harsh treatment meted out by the Japanese to Philippine civilians generally, but were also well aware of the fact that two members of petitioner's Board of Directors had previously been imprisoned and harshly treated by the Japanese on suspicion of financing the guerilla movement in the Philippines. These facts convinced petitioner's officials that if they did not comply with the Military Order, they would suffer imprisonment or worse (R. 42, 43, 320).

In view of these facts, petitioner, between March 2 and March 9, 1943, delivered to Nampo, pre-World War II Philippine Treasury certificates in the amount of 638,000 pesos in the denominations of 1, 2, 5, 10 and 20 pesos (R. 45-48, 53-55, 201, 235-240, 320, 346). At the time of the delivery petitioner was informed by Nampo that Nampo intended to send the Treasury certificates delivered to it by petitioner to Bacolod, Negros, for the purpose of redeeming emergency currency which had been circulating prior to the occupation of the Island of Negros by the Japanese (R. 43-45, 201).

The above-described 638,000 pesos of Philippine Treasury certificates delivered by petitioner to Nampo had been owned by petitioner since prior to the Japanese occupation of the Philippines, and these Treasury certificates had remained in the vaults of petitioner until the forced deliveries occurred in March 1943 (R. 36-38, 57-60, 319).

During the period March 2—March 9, 1943, Nampo commingled the 638,000 pesos of Philippine Treasury certificates delivered by petitioner to Nampo with an additional amount of Treasury certificates already in the hands of the Japanese Military authorities. This commingled fund of Philippine Treasury certificates amounting to 4,042,000 pesos was packed in boxes by Nampo (R. 38-48, 126-127, 129, 165, 166, 177; 201-202, 211, 241, 296, 297, 312, 313, 318, 346).

On March 9, 1943, following the last delivery of Treasury certificates by petitioner, Nampo ordered representatives of PNB, accompanied by employees of Nampo, to take the commingled fund of Treasury certificates and other currency, totaling 4,042,000 pesos, half and half, to the PNB branches at Iloilo, Panay, and Bacolod, Negros, to be used in redeeming emergency notes in accordance with the program established under Executive Orders 137 and 136. The respective amounts of this commingled

fund of currency were in fact received by the respective branches of PNB at Iloilo and Bacolod in March 1943 (P2,021,200 by each branch) (R. 126-127, 129, 165, 166, 176-177, 193, 201-202, 211, 241, 256-259, 275, 277, 279, 287, 291, 296-297, 312-313, 316, 346).

Since petitioner knew that the Japanese Military notes forced upon it in exchange for its Treasury certificates were worthless and did not constitute payment for the valid prewar Treasury certificates taken from it, the Military notes were not used by petitioner in the conduct of its business. Rather, for convenience of storage, they were exchanged with Nampo for Japanese Military notes of larger denomination, such Military notes being immediately segregated by petitioner and kept in its vaults, where they are still being held to this day (R. 41, 48, 53-56, 313, 320).

Following General MacArthur's return to the Philippines, Japanese Military notes were declared null and void by Executive Order No. 25, issued by the Government of the Commonwealth of the Philippines on November 18, 1944, and transactions in such notes were prohibited. By the same Executive Order, the legal tender character of pre-war Treasury certificates was confirmed (R. 51-52, 242, 243).

Even prior to Executive Order No. 25 making them null and void, Japanese Military notes had depreciated in value in terms of pre-war Treasury certificates, so that before the end of the Japanese occupation of the Philippines, these Japanese Military notes were, in fact, worthless (R. 21-25, 51-54, 194, 195, 197). (See *Hilado v. De la Costa*, No. L. 150, April 3, 1949, 46 Official Gazette Philippines) 5472-5481.)

Thus, petitioner was not only forced to deliver currency which it did not want to deliver in exchange for Japanese Military notes which it did not want to receive,

but, in fact, the value of the notes received was less than that of the currency surrendered at the time of delivery, and became valueless thereafter. Petitioner thus suffered a total loss.

Of the one-half of the commingled fund of Philippine currency delivered by Nampo to the Bacolod branch of the PNB as aforesaid (P 2,021,200), part was used in the redemption of emergency currency (a program which was halted by the Japanese in October 1943), part was used in the general operations of the Bacolod branch, and part was exchanged with the Japanese Army for Military notes (R. 90-92, 95, 97, 176-177, 199, 202-203, 215-216, 269-271, 273, 277, 278, 296, 312, 314, 316, 346).

On March 2, 1945, the balance of the commingled fund of Philippine currency remaining in the possession of the Bacolod branch of PNB was transferred to the Bank of Taiwan, Ltd. at Bacolod, by order of the Japanese Military authorities (R. 166-167, 199, 202, 212-213, 312, 316, 323, 346).

The balance of the Bacolod shipment of March 1943 which was thus transferred to the Bank of Taiwan on March 2, 1945, included 788,601 pesos in Philippine Treasury certificates and 301,440, in Philippine National Bank notes (R. 166-167, 199, 202, 203, 213, 278).

Subsequently, in face of the invasion of the United States Armed Forces, the Japanese Military Authorities buried this balance of currency in the mountains near Bacolod, Negros, where, in the latter part of March 1945, it was captured by units of the United States Army. The amount captured consisted of 662,387 pesos in Philippine Treasury certificates (some 30,000 pesos more than was originally taken from petitioner) and 289,900 pesos in Philippine National Bank notes (R. 17-25, 165-173, 184-185, 186, 188, 189, 199, 203, 212-216, 300, 301, 312, 315-316, 345).

Findings including the substance of the foregoing facts were incorporated in both the opinions of the Trial Court (R. 308-328) and the Court of Appeals (R. 345, 346).

At the time that the above-described currency was captured by the American Armed Forces; it was not in the hands of the Japanese, and there was nothing found with it to prove that it was owned by the Japanese. At that point, the Alien Property Custodian could not properly exercise his vesting powers under the Trading with the Enemy Act because he had no basis for concluding that the currency was owned by the Japanese. Accordingly, he made an investigation which lasted over two years. Finally, on August 5, 1957, he issued Vesting Order P-285 (R. 189, 190, 204). That Vesting Order set forth the following finding of fact as the basis of the exercise of the statutory power to vest the property in question as Japanese-owned (R. 189):

"Vesting Order No. P-285

"Re: Sum of Money Owned by the Imperial Japanese Government

"Under the authority of the Trading with the Enemy Act, as amended, the Philippine Property Act of 1946, and Executive Order 9818, and pursuant to law, the undersigned, *after investigation, finding:*

1. That the property described as follows:

The sum of P662,387.00 in Philippine Treasury Certificates, deposited with the accounts of Lt. Col. G. G. Woehrle, FD, Col. VO, No. 1715, May 1945 to the credit of General Fund Receipt 213897 and P289,000.00 in Philippine National Bank Notes, presently in the possession of Major D. Arnhols, Executive Officer of the Fiscal Director, PHH, RYCOM, *representing the balance of the money deposited by the Southern Resources Development Bank (Nampo Kaihatsu Kinko) with the Philippine National Bank, Bacolod Branch, which were captured by the Armed Forces late in March 1945*

> is property within the Philippines owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country (Japan);" (Italics added)

As appears from the foregoing finding of fact in the Vesting Order, the only basis upon which the Custodian, after two years of investigation, was able to conclude that the currency in question was owned by the Japanese and, hence, subject to his powers, was that it was the balance of the money which had been delivered by the Japanese bank, Nampo, to the Philippine National Bank at Bacolod, and turned over in March 1945 to the Bank of Taiwan (R. 189). *This was the balance of the money claimed by petitioner to have been taken from it by the Japanese in 1943.*

Subsequent to the issuance of the Vesting Order, as aforesaid, petitioner, pursuant to the provisions of Section 32 of the Trading with the Enemy Act, filed an administrative claim to recover P638,000 of the Philippine Treasury certificates covered by the Vesting Order (R. 196-203). Section 32 authorizes the administrative return of vested property when it is determined that the person filing claim for return "was the owner of such property or interest immediately prior to its vesting," provided certain other eligibility requirements are met. In the administrative proceeding brought by petitioner under Section 32, just as in the present case, one of the issues necessarily involved was whether the money captured by the Armed Forces of the United States, and subsequently vested by the Alien Property Custodian, was the same money as that delivered by Nampo to the Philippine National Bank Branch at Bacolod in 1943 and turned over to the Bank of Taiwan in March 1945.

The Director of the Office of Alien Property referred to the Philippine Alien Property Administrator of

United States) conducted protracted hearings on this and other issues. At those hearings, voluminous evidence, both testimonial and documentary, was presented. After the most careful consideration of all of this evidence not only by a Trial Examiner, but also, upon review by the Director, the Director, although denying petitioner's claim on other grounds; concluded, in the most detailed and specific manner that the money captured by the United States Army was the very same money as that which was turned over to the Bank of Taiwan in March 1945 by the PNB branch at Bacolod, Negros. And, before the Director's decision became final, it was reviewed and approved by respondent Attorney General (R. 197-203, 311).

In his decision, the Director of the Office of Alien Property made the following specific findings of fact (R. 199, 201, 203):

> "The claimant [BPI] thereupon delivered to Nampo the sum of P638,000.00 in Philippine treasury notes between March 2, and March 9, 1943. * * * At some time during this period, a representative of the claimant was told by a Mr. Higuchi, assistant manager of Nampo, that the treasury certificates were to be sent to the Bacolod branch of the PNB for the redemption of emergency currency issued in Negros Oriental during the early stages of the war. * * * (R. 201)
>
> "Approximately concurrently with the above-described events, the employees of Nampo were preparing to ship a large sum of Philippine currency to the Visayas, pursuant to the 'pacification' plan heretofore described, for the redemption of the emergency notes issued by the PNB and provincial authorities in 1942 (R. 201)
>
> "A total of P2,021,200.00 was placed in a number of boxes addressed to the Iloilo branch of the PNB, and an equal sum in other boxes addressed to the Bacolod branch of the same bank. The currency placed in these boxes was made up of Philippine treasury certificates and PNB circulating notes [in] undisclosed

proportions. A representative of the PNB was present during this operation. (R. 202)

"On or about March 9, 1943, the boxes containing the P 4,042,400.00 for Iloilo and Bacolod were placed aboard a vessel in Manila for transportation to their two destinations. Aboard the vessel were representatives of PNB, who made delivery of the currency to the Iloilo and Bacolod branches. (R. 202)

"Of the currency delivered to the Bacolod branch of the PNB part was used in the redemption program (which was halted in October, 1943), part was used in the general operations of the bank, and part was exchanged with the Japanese Army for military scrip. • • • (R. 202)

"This document, then, shows that on March 2, 1945, there was left of the Bacolod shipment of March 1943, a total of P 788,601.00 in treasury certificates. • • • (R. 203)

"*This money (which was carried to the hills by the retreating Japanese Army) was found in a cache near Silay, Negros Occidental, by the advancing U. S. Armed Forces, late in March 1945. At that time the total had been reduced to P 951,287.00, of which sum P 662,287.00 was in treasury certificates.* (R. 203) • • • *This sum was vested by Vesting Order No. P 285.*" (R. 199) (Italics added)

Decision of the District Court

At the trial, in attempting to show that the currency covered by Vesting Order No. P-285 was the same currency as that which had been received in 1943 from the Japanese Bank, Nampo, by the PNB branch at Bacolod, Negros, and which was delivered to the Bank of Taiwan at Bacolod in March 1945 by the PNB branch, Bacolod, petitioner offered in evidence the above-described Vesting Order and the above-described Decision of the Director of the Office of the Office of Alien Property.

When the Vesting Order and the Decision of the Director of the Office of Alien Property were offered in

de. As proof of these facts, respondents did not contest or contradict the accuracy of such findings of fact. They simply argued that these findings of fact in the official Vesting Order and Decision were not evidence (R. 17-25). The Trial Court sustained this objection, and subsequently held that petitioner could not recover the vested currency because it had not proved by a preponderance of the evidence that the vested currency was the same currency as that claimed by petitioner (R. 327-328).

The Trial Court also held against petitioner on the ground that the forced taking of petitioner's Treasury certificates by the Japanese was lawful and valid (R. 320-322, 328). On this question of law, petitioner contended that the seizure by the Japanese in 1943 under force and duress of petitioner's Philippine Treasury certificates was, under American law, illegal and null and void and conferred no title to such certificates on the Japanese Military authorities. Petitioner presented to the Trial Court ample citation of authority establishing that the Executive and Legislative branches of the United States Government have determined, as a matter of law, that this Government will not recognize as valid those orders of Japan and other Axis powers issued during World War II, which purported to transfer to Japan the title to property of Allied nationals, but will consider such orders to be null and void. Petitioner further presented to the Trial Court ample citation of authority demonstrating that the forced transfer of its Treasury certificates to the Japanese, having been wrongful, and null and void under American law, petitioner, under well recognized common law principles involving the tracing of wrongfully commingled property, was entitled to follow the commingled fund and recover its Treasury certificates from any part of the commingled fund which it could find, including the vested currency here involved. (American Law Institute, *Restatement of the Law of Restitution*, Secs. 209, 211;

Knatchbull v. *Hallett* (In re Hallett's Estate) (1879) L.R. 13 Ch. Div. 696; *National Bank* v. *Insurance Co.*, 104 U.S. 54)

Notwithstanding the clearly established legal principles involved, the Trial Court held that the forced transfer of petitioner's Treasury certificates to the Japanese Military Authorities against its will was lawful and transferred valid title to the Japanese Military Authorities (R. 320, 322, 328).

Decision of the Court of Appeals

On appeal, petitioner urged that both of the foregoing rulings of the Trial Court constituted error as a matter of law.

Petitioner asserted to the Court of Appeals that the Trial Court could not properly ignore the established policy of the United States Government to refuse to recognize transfers of property of Allied nationals ordered by the Axis powers during World War II and hold as lawful and valid the 1943 transfer of Philippine Treasury certificates made against its will by petitioner to the Japanese Military Authorities under the compulsion of a Japanese Military Order. (*Latvian State Cargo & Passenger S.S. Line* v. *McGrath* (D.C. Circuit) 188 F. 2d 1000; cert. den. 342 U.S. 816)

Petitioner also urged that the Trial Court erred, as a matter of law, in ignoring and refusing to admit in evidence the specific findings of fact contained in the Vesting Order and the Decision of the Director of the Office of Alien Property to the effect that the Philippine Treasury certificates to which title was claimed by petitioner was the same money as that seized by the United States Government pursuant to Vesting Order No. P-285.

The Court of Appeals, conceding that plaintiff had established the taking of its currency by the Japanese

pursuant to Military Order and the commingling of such property in the fund which was ultimately sent to Bacolod, Negros (R. 346), affirmed the decision of the Trial Court on *the sole ground* that petitioner had not established that the vested currency was the *same* currency as the balance of the commingled fund which remained in Bacolod, Negros, and which was delivered to the Bank of Taiwan in March 1945 (R. 346-349).

The Court of Appeals specifically held that the Trial Court did not err in refusing to admit in evidence the findings of fact in the Vesting Order and the Decision of the Director of the Office of Alien Property determining that the vested property *was* the same property as that claimed by petitioner.

The Court of Appeals *expressly restrained* from passing upon the ruling of the Trial Court that the forced transfer of petitioner's Philippine Treasury certificates to the Japanese was lawful. (R. 350)

REASONS FOR ALLOWANCE OF THE WRIT

This petition presents important questions of administrative and constitutional law affecting not only the proper administration of the Trading with the Enemy Act, but also other statutes of the United States.

The decision of the Court of Appeals of which review is sought establishes the novel and anomalous doctrine that findings of fact made by administrative agencies of the United States Government within the scope of their authority may not be introduced in evidence by a private litigant in a suit against the United States, even though the accuracy of such findings is not challenged by the Government or contradicted by the evidence, and even though such findings constitute, under the well-established rules of evidence, admissions which are not only competent but also directly relevant and material to basic issues in the litigation.

The serious implications of this doctrine extend far beyond the administration of the Trading with the Enemy Act which is involved in the present case.

It is, of course, well established that findings of fact made by an agency of the United States Government will, when *challenged* in the Courts, be protected by the presumption of validity accorded to official acts, and by the rule that such findings are conclusive unless shown to be unsupported by substantial evidence on the record as a whole or erroneous as a matter of law. See, e. g., *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474.

What the Court of Appeals has now said, however, is that a private litigant seeking to enforce legitimate statutory or constitutional rights against the United States may *not* offer *unchallenged* findings of fact of a government agency in evidence, and that such *unchallenged* findings of fact have no standing whatsoever in the Courts. This is a convenient doctrine for those who represent the Government in litigation. But it has no foundation either in law or justice.

The application in the present case of this novel doctrine of the inadmissibility in evidence of findings of fact made by administrative agencies of the United States Government involves not merely an error of law on the issue of admissibility of evidence, but has resulted in the denial to petitioner of important constitutional rights. Only an intervention by this Court can prevent petitioner's being deprived of its property without due process of law.

The refusal of the lower courts to admit the findings of fact in the Vesting Order and Director's Decision in evidence arose from their failure to follow and apply the controlling decisions of this Court in *City of Chicago* v. *Greer*, 9 Wall. 726, 732, 733 and *United States* v. *Chemical*

Foundation, 272 U.S. 1, 14, 15. The decision of the lower courts in this regard is also in direct conflict with the decisions in other Circuits and the Court of Claims. *Vanadium Corporation* v. *Fidelity & Deposit Co.* (CCA 2), 159 F. 2d 105, 109, 110; *Quinn* v. *United States* (CCA 3), 58 F. 2d 19, 20; *Woods* v. *Turk* (CCA 5), 171 F. 2d 244, 245; *Kolar* v. *Woods* (CCA 5), 189 F. 2d 736, 739; *Irwin & Leighton* v. *United States*, 101 Ct. Cl. 455; *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 284, 63 F. Supp. 653; *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 69 F. Supp. 409.

By these rulings of the lower courts petitioner was not only denied a "hearing" and an "opportunity to present evidence" on a basic issue in the case contrary to this Court's decision in *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U.S. 165, 171, but also, in practical effect, was deprived of the judicial hearing on its claim under Section 9(a) of the Trading with the Enemy Act which this Court has only recently held to be essential to rescue that section from "constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 211, 212.

The additional ground relied upon by the Trial Court in denying petitioner's claim to recover the vested currency (R. 320-323) but which was not reached by the Court of Appeals in its decision (R. 350), raises important questions involving the foreign policy of the United States and the effect to be given by the Courts to policy pronouncements of the Executive and Legislative branches of the United States Government concerning the non-recognition of foreign decrees.

The Trial Court's refusal to give effect to the foreign policy pronouncements of the Executive and Legislative

branches of the United States Government is not only calculated to disturb the foreign relations of the United States, but is also directly in conflict with the decisions of various Federal courts in like cases. *Latvian State Cargo & Passenger S.S. Line* v. *McGrath* (D.C. Circuit) 188 F. 2d 1000, cert. den. 342 U.S. 816; *The Maret* (CCA 3) 145 F. 2d 431.

Refusal to Admit in Evidence the Findings of Fact In the Vesting Order and Director's Decision Was In Direct Conflict with Applicable Decisions of This Court and with Decisions in Other Circuits and the Court of Claims

There can be no dispute that the unchallenged findings of fact in the Vesting Order and the Decision of the Director were made pursuant to the statutory duties of the officials concerned (Trading with the Enemy Act) and, hence, were clearly within the scope of their authority.

In refusing to admit these official and unchallenged findings of fact in evidence both the Trial Court and the Court of Appeals acted in complete disregard of decisions of this Court as well as Courts of Appeals in other Circuits.

In *City of Chicago* v. *Greer*, 9 Wall 722, 732, 733, this Court held that statements made by a public official in the performance of his official duty and within the scope of his authority are admissible in evidence as admissions by the governmental entity on whose behalf the official was acting. And see, *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 499, 500.

In *United States* v. *Chemical Foundation*, 272 U.S. 1, the United States Government sought to set aside a sale of vested property which had been made by the Alien Property Custodian. The Government, among other things, *challenged* the findings of fact made in the order of sale issued by the Alien Property Custodian, and al-

leged that the sale was made by the Custodian without knowledge of the material facts set forth in the order of sale and upon which that order was based. The lower court declined to review the findings of fact contained in the order of the Custodian. This Court upheld that ruling, stating (272 U.S. 14, 15):

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties • • •. Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact upon which they rest, will not be reviewed by the courts."

See also, *Confiscation Cases (United States v. Clarke)* 20 Wall 92, 108; *Evanston v. Gunn*, 99 U.S. 660, 666-667; *Heath v. Wallace*, 138 U.S. 573, 584-585.

The Court of Appeals in its decision in the present case completely ignored the doctrine of the *Greer* case and made the surprising assertion that the decision in *Chemical Foundation* is not applicable here because the findings of fact in that case had been challenged, whereas in the present case the accuracy of the findings were not challenged (R. 349). Did the Court of Appeals really intend to say that official findings are more admissible when challenged or denied by the Government than when they are not challenged?

Both the Trial Court and the Court of Appeals ignored decisions in several other Circuits which, if followed, would have required the admission in evidence of the Vesting Order and the Director's Decision.

In *Quinn v. United States* (CCA 3) 58 F. 2d 19, suit was brought against the United States on a war risk insurance policy. The suit there, as here, was a *de novo* proceeding. Plaintiff applied for payment of insurance on

the ground of permanent and total disability. The Veterans Bureau had disputed the claim and rejected it in an administrative proceeding. In attempting to sustain his burden of proving the service connection of his disabilities and their total and permanent character, plaintiff offered in evidence official documents of the Veterans Bureau containing ratings, findings, and rulings with regard to plaintiff's claim. The Government objected to the admission of these official documents on the ground that they were incompetent and irrelevant. This objection was overruled by the District Court which held that the rulings and findings of the Veterans Bureau constituted admissions which would be received in evidence against the Government. On appeal, the District Court's ruling was sustained by the Court of Appeals.

Precisely the same result was reached in *McGarry* v. *United States* (DCD Montana) 294 Fed. 108.

The admissibility in evidence of administrative decisions of the Secretary of the Interior was upheld in the case of *Vanadium Corporation* v. *Fidelity and Deposit Co.* (CCA 2) 159 F. 2d 165. And decisions in other Circuits have reached the same result in the case of findings of fact made by other agencies of the United States Government. See, e.g., *Kolar* v. *Woods* (CCA 5), 189 F. 2d 736, 739; *Woods* v. *Turk*, (CCA 5) 171 F. 2d 244, 245.

The decision of the Court of Appeals is also in direct conflict with several decisions of the United States Court of Claims. *Irwin & Leighton* v. *United States*, 101 Ct. Cl. 455; *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 70, 63 F. Supp. 409; *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 69 F. Supp. 409. In those cases the Court of Claims held that findings of fact and official statements of Government contracting officers are admissible in evidence as admissions by the United States.

In view of the foregoing decisions, petitioner submits that the refusal of the lower courts to admit in evidence the findings of fact in the Vesting Order and the Director's decision was erroneous and improper.

Refusal to Admit in Evidence the Findings of Fact in the Vesting Order and Director's Decision Constituted a Denial of Due Process of Law to Petitioner and Transformed the Vesting Order into a Taking of Petitioner's Property without Payment of Just Compensation.

As above indicated, petitioner could only avail itself of the remedy provided by Section 9(a) of the Trading with the Enemy Act to recover its property if it could prove that the vested currency was the same as the balance of the currency looted from it by the Japanese Military authorities. Because of the battle conditions which existed when the property was captured by the American Armed Forces, no witnesses were ever available who could testify directly as to the identity of the currency. Therefore, the only substantial evidence available on this issue were the official findings of fact made in the Vesting Order and the Director's Decision pursuant to statutory duty and after careful and thorough investigation. These findings specifically prove that the vested currency was the same as the currency claimed by petitioner.

By refusing to admit in evidence the Vesting Order and Director's Decision, petitioner was deprived of the opportunity to present evidence on this crucial issue in the case. For the reasons indicated above, there is no question that the evidence was competent. Nor is there any challenge to the materiality or relevancy of such evidence.

As this Court has held on several occasions, this ruling of the lower courts constituted a denial of a "hearing" and, hence, a denial of due process of law to petitioner.

In the case of *Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 171, this Court stated:

> "Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

And in *Saunders v. Shaw*, 244 U.S. 317, 319, this Court, in an opinion by Mr. Justice Holmes, stated:

> "Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Moreover, the refusal of the lower courts to admit in evidence the Vesting Order and the Director's Decision in practical effect, also denied to petitioner the judicial hearing which is essential to preserve the constitutionality of Section 9(a) of the Trading with the Enemy Act.

For all practical purposes, the present petitioner has been put in the very same position as that which this Court refused to sanction in *Societe Internationale Pour Participations Industrielles, et Commerciales, S.A. v. Rogers*, 357 U.S. 197. Having been denied the opportunity to prove the preliminary fact essential to its claim under Section 9(a), petitioner did *not* in reality have in the Court of Appeals the opportunity for a judicial hearing on the fundamental issue, namely, whether it was the legal or beneficial owner of the vested currency at the time of the vesting.

The Court of Appeals affirmed the Trial Court's decision *solely* on the ground that the Vesting Order and

Director's Decision had been properly excluded from evidence, and hence that petitioner had not proved the identity of the vested currency with that claimed by it. The Court of Appeals *specifically restrained* from passing on the other question, namely, petitioner's ownership of the vested funds (R. 350).

The practical effect of this ruling was to deny completely to petitioner the remedy afforded by Section 9(a) of the Trading with the Enemy Act.

As this Court indicated in the *Societe Internationale* case, *supra*, this raises serious constitutional questions. In that case, reiterating a long-established doctrine, this Court stated (357 U.S. 211):

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the due process and just compensation clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See Stoehr v. Wallace, 255 U.S. 239, 245, 246, 69 L.Ed. 604, 612, 41 S. Ct. 293; Guessefeldt v. McGrath, 342 U.S. 308, 318, 96 L. Ed. 342, 350, 72 S. Ct. 338; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 75 L. Ed. 473, 476, 51 S. Ct. 229." See also, *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79, 80.

In its petition for rehearing or rehearing *en banc*, petitioner raised these constitutional objections to the decision of the Court of Appeals, and requested that court to make a specific ruling on such constitutional issues (R. 352-372, Appendix B, *infra*, pp. 21a-42a). By denying these petitions without opinion (R. 373, 374), the Court of Appeals declined to consider such issues.

It follows, from the foregoing, that unless this Court acts, by considering and deciding all of the issues in the case, the United States Government will have been en-

riched without there having been any real judicial scrutiny of the "taking" of petitioner's property.

The Trial Court's Ruling That the Taking by the Japanese Military Authorities in the Philippines of Petitioner's Property by Force and Duress was Legal and Valid is in Direct Conflict with the Foreign Policy of the United States, and Not Having Been Considered by the Court of Appeals, Should be Rectified by this Court.

As above indicated, the Trial Court decided an important question affecting the foreign policy of the United States in a manner completely in conflict with the pronouncements of both the Executive and Legislative branches of this Government. That issue was not considered or passed upon by the Court of Appeals. (R. 350) In such circumstances, petitioner respectfully submits that it is not only proper but also highly desirable for this Court to consider the issue and resolve the conflict between the decision of the Trial Court and the foreign policy of the United States as stated by the Executive and Legislative branches of the Government.

Simply stated, the issue is this. Petitioner pursuant to the compulsion of a Military Order issued by the Japanese Military authorities in the Philippines during World War II, delivered to the Japanese 638,000 pesos of valid pre-World War II Philippine Treasury certificates which it had owned and had kept in its vaults since prior to the Japanese occupation. Petitioner did not want to part with these certificates, but delivered them by reason of fear of the consequences of non-compliance with the Japanese command—a fear engendered by the harsh Japanese treatment of civilians in the Philippines, including officers of the petitioner. (R. 42, 43, 320).

The Trial Court held that this forced delivery was legal and valid and conferred good title to the currency on the Japanese. (R. 320-322, 328).

In reaching this conclusion, the Trial Court refused to take into account the many pronouncements of the Executive and Legislative branches of the United States Government and the provisions of international agreements to which the United States was a party establishing the rule of law that the United States would not recognize as valid such forced transfers. (R. 322)

During and since World War II, the United States Government has consistently taken the position that, as a matter of law, the war, instituted by the Axis powers, was a war of aggression in violation of international law, and, being illegal and criminal, did not confer on Germany, Japan or the other Axis powers, the "rights" with respect to occupied areas customarily accorded to belligerents under The Hague Regulations and other rules of international law regarding the conduct of war.

This basic legal position of the United States was most succinctly stated by Mr. Justice Jackson in his Report of June 7, 1945, to the President of the United States, concerning the trial of war criminals (Department of State Publication 2420, 1945, pp. 8, 9, 10). (Appendix A, *infra*, p. 2a).

Moreover, this legal doctrine was made specifically applicable to the situation involved in the present case by the Inter-Allied Declaration of June 5, 1943. The United States Government in that Declaration joined its Allies in expressing determination to refuse to recognize these forced transfers of property in enemy controlled territory (8 Department of State Bulletin 21). (Appendix A, *infra*, p. 1a). Related and similar declarations were contained in the Final Act of the United States Monetary and Financial Conference of July 22, 1944 (11 Department of State Bulletin 384) and in Resolution XIX of the Inter-American Conference on Problems of War and Peace of March 8, 1945 (Pan American Union, Congress Conference Series No. 47 (1945) p. 47).

Following the defeat of the Axis Powers, the United States and its Allies translated into action this legal principle of the non-recognition of forced transfers of property. The Allied authorities both in Germany and Japan instituted a comprehensive program for the restitution of all kinds of property looted in the territories occupied by Germany and Japan. Under this restitution program, property of all kinds and valued at hundreds of millions of dollars was restored to the countries and peoples from which it had been looted.

In Japan, a restitution program was instituted by directives to General MacArthur, Supreme Commander of the Allied Powers in Japan. These directives emanated both from the United States Government and from the Far Eastern Commission, an inter-governmental body of which the United States Government was a member. (Appendix A, *infra*, pp. 5a-8a).

Pursuant to these directives, General MacArthur, by a series of orders addressed to the Japanese Government put into effect a comprehensive program for the discovery, impounding and return of property looted by the Japanese in areas occupied by them.

The Far Eastern Commission Basic Directive to General MacArthur of June 26, 1947, specifically provided (Appendix A, *infra*, p. 6a):

> "Full and prompt restitution will be required of all identifiable property, *looted, delivered under duress, or paid for in worthless currency.*" (Italics added)

And the superseding Policy Directive on Restitution approved by the Far Eastern Commission on July 29, 1948, stated (Appendix A, *infra*, p. 7a).

> "The fact that payment was made should be disregarded unless there is conclusive evidence that fraud, force or duress did not take place. * * *"

In an Order to the Japanese Government on April 19, 1946 (Appendix A, *infra*, p. 8a), General MacArthur, as Supreme Commander for the Allied Powers in Japan, directed the Japanese Government to seek out, inventory and impound:

> "all identifiable looted property which is now in Japan and which has been the subject of transfer under duress, wrongful acts of confiscation, dispossession, or spoliation, *whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise, in areas occupied by the Japanese Armed Forces since 7 July 1937.*" (Italics added)

The State Department of the United States has never deviated from its policy of refusing to give recognition to forced transfers of property such as that here involved. (See, for example, Press Release issued on April 27, 1949, by Department of State, Appendix A, *infra*, p. 13a)

Not only has the United States Government consistently required that Germany and Japan restore to the owners thereof property taken in the territories occupied by the armed forces of such countries, but it has also rigorously compelled Germany and Japan to return sequestered property of Allied nationals situated in Germany and Japan proper. And in cases in which United States and other Allied property which was situated in Japan at any time between December 7, 1941, and September 2, 1945, cannot be returned or has been damaged, the United States has required Japan to provide compensation to the owners for the loss of and or damage to such property. This is specifically provided in Article 15(a) of the Peace Treaty between the Allied Powers and Japan which came into force on April 28, 1952, and by the terms of the Allied Powers Property Law (Japanese Law No. 294 of 1951). (Appendix A, *infra*, p. 8a.)

The determination of the United States Government not to recognize transfers of property ordered by the

Axis Powers during World War II has been specifically applied to claims, such as this, for the return of property vested under the Trading With the Enemy Act.

In 1946, Congress added to the Trading With the Enemy Act a new Section 32 (60 Stat. 50, 50 U.S.C. App., Sec. 32) which provides for the administrative return of property vested during World War II, and which is, of course, *in pari materia* with Section 9 of that Act under which the present suit is brought. Section 32 authorizes the return of vested property whenever it is determined that:

> "the person who has filed a notice of claim for return * * * was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian * * *."

provided that certain other eligibility requirements are met.

In requesting the enactment of section 32, the Secretary of State, the Attorney General and the Alien Property Custodian, in a joint letter, dated June 29, 1945, to the Chairman of the House Judiciary Committee stated:

> "The President, or such officer or agent as he may designate, would be required, before making any return of property, to determine that the claimant had owned property immediately prior to the vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question of whether any property claimed had been transferred to enemy ownership under duress. If such were the case, the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting." (Hearing before Subcommittee 1 of House Judiciary Committee on H.R. 3750, September 12, 1945, Serial No. 7, p. 4.) (Appendix A, *infra*, p. 12a).

The reports of the House and Senate Committees concerning the bill which was enacted as section 32 specifically stated:

"In construing who was the 'owner' immediately prior to vesting, acts of enemy governments which sought to divest non-enemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the 'owner' for purposes of this statute." (Senate Report No. 979, 79th Cong., 2d Sess., pp. 3, 4; House Report No. 1269, 79th Cong., 1st Sess., p. 4; U.S. Code Congressional Service (1946) p. 1103) (Appendix A, *infra*, p. 12a)

This direction of the Congress is clear and unequivocal. In determining whether non-enemies claiming the return of vested property under the Trading With the Enemy Act were the owners of such property at the time of vesting, transfers of such property which were ordered by Japanese or German Military authorities *must be ignored.*

The refusal of the Trial Court to recognize these clearly stated policy pronouncements of the Executive and Legislative branches of the United States Government was in direct conflict with the well-established principle that when those branches of the United States Government have determined upon a foreign policy which involves the non-recognition of specific foreign decrees, such non-recognition must be given effect by the courts. See, e.g., *Latvian State Cargo & Passenger S.S. Line v. McGrath* (D.C. Circuit), 188 F. 2d 1000, cert. den., 324 U.S. 816; *The Maret* (CCA 3) 145 F. 2d 431.

Quite Apart from the Vesting Order and Director's Decision, a Liberal Rule of Identification is Applicable and Requires The Conclusion that the Vested Money is the Same as that Claimed by Petitioner.

The decisions of the lower courts are also patently in error in their definition of the nature of the burden of

proof resting on petitioner in connection with the identification of the vested property. Both courts held that petitioner must prove "by a preponderance of the evidence" that the vested currency is the same as that looted from petitioner by the Japanese (R. 327, 328, 346-349). In its opinion, the Court of Appeals made the surprising statement that (R. 348):

> "We do not feel compelled to relax this burden [of persuasion] in cases where, as in this, *the friendly nationality of the claimants is unquestioned.*" (Italics added)

Aside from the curious nature of the suggestion that the burden of proof to be met by persons suing under Section 9(a) who are admittedly non-enemies should be as onerous as that of persons whose non-enemy nationality is questioned, the Court of Appeals' statement and application of the rule is directly in conflict with the rule of proof adopted by the United States Government and its Allies in binding International Agreements.

The United States Government and its Allies have adopted and applied, in the case of Japan, a liberal rule of identification with respect to forced transfers of property of the very kind involved in the instant case. Thus, the Policy Directive on Restitution, approved by the Far Eastern Commission on July 29, 1948, and the directive to SCAP based on this policy decision specifically provided (Department of State, Documents and State Papers, Vol. I, No. 6, Sept. 1948, p. 429, Appendix A, *infra* p. 7a):

> "13. In applying standards of identification with respect to claims for looted property, the Supreme Commander for the Allied Powers should observe the following principles:
>
> "(a) In case of doubt, the presumption should be in favor of the claimant country wherever permitted by the broadest application of law, equity and common sense."

There is no question that this liberal rule of identification should have been applied by the Trial Court and the Court of Appeals, and that its application would have required a decision in favor of petitioner on this issue. For, even without the findings of fact in the Vesting Order and Decision, the circumstantial evidence as to identify was sufficient proof (R. 167, 169-173, 185, 189, 199, 202-203, 212-216, 300, 301, 302).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October , 1960.

APPENDIX A

Constitutional Provision

AMENDMENT V

"• • • nor shall any person • • • ; • • • be deprived of life, liberty, or property, without due process of law; • • •"

Treaties and Other International Agreements

INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL, January 5, 1943. 8 Department of State Bulletin (1943), p. 21

"The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxemburg, the Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee:

"Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

"Accordingly, the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights, and interests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transac-

tions apparently legal in form, even when they purport to be voluntarily effected.

"The governments making this declaration and the French National Committee solemnly record their solidarity in this manner."

REPORT OF ROBERT H. JACKSON TO THE PRESIDENT, TRIAL OF WAR CRIMINALS, RELEASED BY WHITE HOUSE, June 7, 1945.

Department of State Publication 2420 (1945), pp. 8-10

The Legal Position of the United States

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.

Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." This, however, was a departure from the doctrine taught by

Grotius, the father of International Law, that there is a distinction between the just and unjust war—the war of defense and the war of aggression.

The Nature of International Law

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the judicial principle that aggressive war-making is illegal and criminal.

The Principle of Unjustifiable War

The reestablishment of the principle of unjustifiable war is traceable in many steps. One of the most signifi-

cant is the Briand-Kellogg Pact of 1928, by which Germany, Italy and Japan, in common with ourselves and practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception. In 1932, Mr. Stimson, as Secretary of State, gave voice to the American concept of its effect. He said, "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. . . . By that very act, we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treatises."

This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime. Without attempting an exhaustive catalogue, we may mention the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight governments, which declared that "a war of aggression constitutes . . . an international crime." The Eighth Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. At the Sixth Pan-American Conference of 1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."

The Principle of Juridical Meaning of Treaties Renouncing War

The United States is vitally interested in recognizing the principle that treaties renouncing war have juridical as well as political meaning. We relied upon the Briand-Kellogg Pact and made it the cornerstone of our national policy. We neglected our armaments and our war machine in reliance upon it. All violations of it, wherever started, menace our peace as we now have good reason to know. An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community, which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.

EXCERPTS FROM UNITED STATES POST-SURRENDER POLICY DIRECTIVE FOR JAPAN, AUGUST 29, 1945

Department of State Publication 2423,
The Axis in Defeat, pp. 108, 109, 113

Part II—Allied Authority

1. *Military Occupation*

There will be a military occupation of the Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above. The occupation shall have the character of an operation in behalf of the principal allied powers acting in the interests of the United Nations at war with Japan. For that reason, participation of the forces of other nations that have taken a leading part in the war against Japan will be welcomed and expected. The occupation

forces will be under the command of a Supreme Commander designated by the United States.

• • • •

4. • • •

Restitution

Full and prompt restitution will be required of all identifiable looted property.

EXCERPTS FROM FAR EASTERN COMMISSION. BASIC POST-SURRENDER POLICY DIRECTIVE FOR JAPAN, JUNE 19, 1947

Far Eastern Commission, Press Release No. 34, July 10, 1947, Enclosure, pp. 1, 7

WHEREAS on September 2, 1945, Japan surrendered unconditionally to the Allied Powers and is now under military occupation by forces of these Powers under the command of General of the Army Douglas MacArthur, Supreme Commander for the Allied Powers and

WHEREAS representatives of the following nations, namely, Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the U.S.S.R., the United Kingdom, and the United States of America, which were engaged in the war against Japan, have on the decision of the Moscow Conference of Foreign Ministers met together at Washington as a Far Eastern Commission, to formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished; THE NATIONS COMPOSING THIS COMMISSION, with the object of fulfilling the intentions of the Potsdam Declaration, of carrying out the instrument of surrender and of establishing international security and stability • • •

HAVE ADOPTED the following basic objectives and policies in dealing with Japan: • • •

4. • • •

Restitution

Full and prompt restitution will be required of all identifiable property, looted, delivered under duress, or paid for in worthless currency.

EXCERPTS FROM FAR EASTERN COMMISSION SUPERSEDING POLICY DIRECTIVE ON RESTITUTION, JULY 29, 1948

Department of State, Documents and State Papers, Vol. 1, No. 6, Sept. 1948, p. 429

• • • •

2. Immediate steps should be taken to restore to Allied countries property which is found in Japan and which is identified in accordance with this paper has having been located in an Allied country at or during the time of occupation of that country, and which was removed by fraud, force or duress by the Japanese or their agents. The fact that payment was made should be disregarded unless there is conclusive evidence that fraud, force or duress did not take place. • • •

13. In applying standards of identification with respect to claims for looted property, the Supreme Commander for the Allied Powers should observe the following principles:

(a) In cases of doubt, the presumption should be in favor of the claimant country whenever permitted by the broadest application of law, equity and common sense.

• • •